NO. 79608-4

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL LIVINGSTON,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

RESPONSE OF THE DEPARTMENT OF CORRECTIONS TO PETITION FOR DISCRETIONARY REVIEW

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I. RESPONDENT

The Respondent is the State of Washington Department of Corrections (DOC).

II. DECISION BELOW

The decision below is a published opinion issued by the Court of Appeals, Division II on November 14, 2006. It is attached as an appendix to the Petition for Discretionary Review.

III. ISSUES FOR REVIEW

The following are the issues that this Court would consider if review were accepted:

1. Prison officials are required by RCW 72.09.530 to screen prison inmates' incoming mail for contraband. Does the Public Records Act require DOC to ignore statutorily-authorized security procedures that do not conflict with the Public Records Act?

2. Does an agency violate the Public Records Act when it complies with all provisions of the Act, but exercises its statutory obligation to maintain a secure prison environment, including screening inmate mail by refusing to deliver contraband to a prison inmate?

3. DOC's mail screening procedures and mail rejections may be appealed administratively, and an inmate may also challenge mail screening procedures or a specific mail rejection based upon an alleged

constitutional violation. Is Petitioner's remedy for withholding mail outside the purview of the Public Records Act?

IV. STATEMENT OF THE CASE

A. DOC COMPLIED WITH ALL ASPECTS OF THE PUBLIC RECORDS ACT IN RESPONDING TO PETITIONER'S PUBLIC RECORDS REQUEST.

On February 19, 2003, Petitioner Michael Livingston, while incarcerated at Olympic Corrections Center (OCC) in Forks, Washington, mailed a public records request pursuant to the state Public Records Act (PRA) RCW 42.56, et seq., to the public records coordinator for OCC. CP 117. The request, which was received on February 20, 2003, was for the training records of a Corrections Officer at OCC. *Id.* The coordinator collected the documents and determined that no exemption from disclosure applied to the records under the PRA. She then mailed them to Petitioner at Cedar Creek Corrections Center (CCCC) where he had been transferred while his request was pending. *See* Published Opinion, Washington Court of Appeals No. 32253-6-II, Appendix to Petition at p. 2.

B. DOC'S STATUTORILY AUTHORIZED MAIL SCREENING PROCEDURES ARE UNRELATED TO AND DO NOT CONFLICT WITH THE PRA.

Pursuant to RCW 72.09.530, the Secretary of DOC is directed by the Legislature to establish a method to screen all incoming mail to

inmates for contraband. To accomplish this requirement, DOC adopted Policy 450.100 which authorizes staff to inspect all incoming mail to prevent offenders from receiving anything that threatens the security and order of the facility. Appendix to Petition at p. 2. If unauthorized mail is received at an institution, it is rejected by mailroom staff and the inmate to whom it was addressed is given a mail rejection notice which explains why the mail was rejected. CP 125. The notice also explains the inmate's rights to appeal the rejection to the Superintendent of the prison. CP 140.

The parties agree that the records at issue were not delivered to Petitioner based solely on the application of DOC Policy 450.100. Because the training records contained personal information about the corrections officer, and because the Superintendent of CCCC considered the possession of such information by inmates created a risk of harm to staff, mailroom staff at CCCC rejected the letter to Petitioner from the OCC coordinator on March 26, 2003. Petitioner was provided with notice of this action. CP 140. Petitioner appealed the rejection to the Superintendent who upheld the rejection. Although not specifically provided for in the policy, Petitioner appealed the Superintendent's decision to his superior, a DOC Regional Administrator, who also upheld the rejection. CP 74.

On December 14, 2005, Petitioner was released from DOC custody and was placed on community supervision. On December 13, 2006, Petitioner's community supervision ended and his DOC file has been closed.

C. PROCEDURAL BACKGROUND.

On July 29, 2003, Petitioner filed a Motion for Order to Show Cause pursuant to the PRA, challenging the mail rejection of the corrections officer's training records by CCCC mailroom staff. CP 2-12. He claimed that since he did not ultimately receive the documents he requested, he was denied disclosure, and he claimed that DOC Policy 450.100 must be the "exemption" DOC is relying on. On August 20, 2004, Thurston County Superior Court Judge Christine Pomeroy entered an order denying Appellant's motion, finding that DOC had complied with the requirements of the PRA. CP 104-05. The court's order read "Respondent had complied with the requirements of the state Public Disclosure Act, RCW 42.17.250, et seq.,[1] when it deposited Petitioner's requested public records in the United States mail on March 21, 2003. That Petitioner was not allowed to possess such records at the institution where he was incarcerated at the time for safety and security reasons means his remedies lie elsewhere than the Public Disclosure Act." *Id.*

[1] Since recodified at RCW 42.56, et seq.

Petitioner appealed the ruling of the Superior Court. In affirming, the Court of Appeals found that DOC discharged its obligation under the PRA when it mailed the documents to Petitioner. Appendix to Petition at p. 5. It did not analyze DOC's argument that the documents were rejected pursuant to its statutory authority to keep contraband from entering prisons.

V. REASONS WHY REVIEW SHOULD BE DENIED

Before a petition for review will be accepted by the Supreme Court, one of the criteria of RAP 13.4(b) must be met. Those criteria include: the decision of the Court of Appeals is in conflict with either a decision by the Supreme Court or in conflict with another division of the Court of Appeals; the decision by the Court of Appeals raises a significant question of law under the Constitution of either Washington or the United States; or the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

Petitioner claims that the Court of Appeals decision conflicts with a decision of this Court and an issue of substantial public interest is involved. Petition at p. 7. However, Petitioner has not cited to a decision of this Court that conflicts with the holding of the Court of Appeals. Rather, he cites to public disclosure cases of general application, asserting that the Court of Appeals misconstrued those decisions. This does not

satisfy the conflict contemplated by RAP 13.4(b)(1). Additionally, while all litigation involving the Public Records Act and a state agency may be said to be of public interest, the criteria of RAP 13.4(b)(4) also requires that the *issue* of substantial public interest "should be determined by the Supreme Court." RAP 13.4(b)(4). The wording of the rule infers that the issue requires clarification or a final decision by this Court. As the Court of Appeals decision presents no conflict with existing case law, and no ambiguity exists as to DOC's statutory obligations, Petitioner has not met the criteria for granting review.

A. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH A DECISION OF THIS COURT.

The basic purpose, construction and operation of the PRA is well settled in case law. *Limstrom v. Ladenberg*, 136 Wn.2d 595, 963 P.2d 869 (1998); *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997); *Progressive Animal Welfare Society (PAWS) v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994). DOC does not dispute it is an agency subject to public disclosure as defined by the PRA. RCW 42.17.020(2). When a public records request is made, the agency must respond within five business days of receiving the request by either providing the record, denying the request and provide a written explanation of what exemption is being claimed, or providing a reasonable

estimate of the time the agency will need to provide a response. RCW 42.56.520.

Here, there is no question that DOC complied with all provisions of the PRA. DOC did not claim an exemption under the PRA, and did not withhold records pursuant to its obligations under the PRA. Petitioner claims that agency policies, such as DOC's mailroom Policy 450.100, nor administrative codes can constitute exemptions from public disclosure. Petition at p. 9. However, nowhere does he address RCW 72.09.530. DOC has not adopted a policy creating an exemption to public disclosure. Rather, its mail screening procedures were developed based upon its longstanding statutory authority and obligation to maintain secure prison facilities.

DOC incarcerates approximately 16,000 offenders and processes thousands of pieces of mail a day. DOC is in a unique position compared to other agencies, because of its obligation to incarcerate felons, who may make a public records request, and to maintain secure prisons. When a document sent to an inmate, whether via a public records request or any other means, threatens that security, it must be rejected pursuant to statute. DOC does not screen mail for all of society, just that portion that resides within its prisons. If Petitioner disagreed with DOC's application of its mail policy here, his remedy was to challenge the constitutionality of it,

not to try and mischaracterize it as an exemption from disclosure when it is not.

1. The Cases Cited In The Petition From This Court Are Not In Conflict With The Court Of Appeals' Decision Below.

Petitioner cites to several cases from this Court which stand for the general proposition that the policies of this state favor broad public disclosure. *See, e.g., Spokane Police Guild v. Liquor Control Board*, 112 Wn.2d 30, 769 P.2d 283 (1989); *Progressive Animal Welfare Society*, 125 Wn.2d 243; *Hearst v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978). Petition at p. 8. However, the Court of Appeals decision below is not in conflict with this principle. It found that even with a policy of broadly construing the Act, "[t]he DOC's obligations under the PDA were discharged when the coordinator mailed the records to Livingston." Appendix to Petition at p. 5. DOC received the request, processed it and mailed it out without claiming an exemption from disclosure. Thus there are no grounds for this Court to review this case as there is no conflict among the cases cited.

2. DOC Has Consistently Asserted That Its Authority To Withhold Delivery Of The Records Is Based Upon RCW 72.09, Not The PRA.

DOC's actions in handling Petitioner's public disclosure request were based upon its statutory obligation to prevent contraband from

entering CCCC. DOC has never asserted that an exemption to the PRA applies to the records he requested. Nevertheless, Petitioner chose to pursue an action through the PRA, but his remedy if he believed documents were improperly withheld by the mailroom was through administrative or legal challenge to the mail rejection.[2]

RCW 72.09.010 states in pertinent part:

> **72.09.010 Legislative intent.** It is the intent of the legislature to establish a comprehensive system of corrections for convicted law violators within the state of Washington to accomplish the following objectives.
>
> (1) The system should ensure the public safety. The system should be designed and managed to provide the maximum feasible safety for the persons and property of the general public, the staff, and the inmates.

Thus, safety of the public, staff and inmates is the number one priority of the Legislature for DOC. Consistent with this concern, the Legislature also enacted RCW 72.09.530 prohibiting the receipt or possession of contraband by inmates. It reads in pertinent part:

> **72.09.530 Prohibition on receipt or possession of contraband--Rules.** The secretary shall, in consultation with the attorney general, adopt by rule a uniform policy that prohibits receipt or possession of anything that is determined to be contraband. The rule shall provide consistent maximum protection of legitimate penological interests, including prison security and order and deterrence of criminal activity. The rule shall protect the legitimate interests of the public and inmates in the exchange of ideas.

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[2] Notably, Petitioner characterizes DOC's actions as seizure of the records. Petition at p. 12 n.2. Once again, DOC is in the unique position because of its obligation to seize contraband coming into a secure prison environment.

> The secretary shall establish a method of reviewing all incoming and outgoing material consistent with constitutional constraints, for the purpose of confiscating anything determined to be contraband.

(Emphasis added.)

Contrary to Petitioner's contention that the Legislature has not given DOC or any other agency the discretion to withhold records (Petition at p. 11), the Legislature has done exactly that. By the authority granted by the Legislature pursuant to this statute, DOC promulgated Policy 450.100, which deals in part with unauthorized incoming mail. CP 126-39. The statutorily-authorized policy was cited by the Superintendent at CCCC as the grounds for rejecting the training records of the corrections officer when they arrived at CCCC for Petitioner. As the Superintendent stated in his declaration, personal information about staff in the hands of offenders, including training records, creates the potential for the offender to retaliate against the staff person or even create the potential for personal harm to the staff person. CP 125.

Understanding the unique issues involved in operating prisons, the courts have long recognized the need to provide latitude to prison administrators in their decision making.

> Courts traditionally have responded to the unique problems of penal environments by invoking a policy of judicial restraint. This policy is designed to give prison administrators wide-ranging deference in the adoption and

> execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Foss v. Department of Corrections, 82 Wn. App 355, 358, 918 P.2d 521 (1996), citing *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878, 60 L. Ed. 2d 447 (1979).

Petitioner argues that the exercise of DOC's authority to reject certain records as contraband allows DOC to create exemptions to the PRA. Petition at p. 10. That is simply not the case as DOC's authority is independent of the PRA. Moreover, accepting Petitioner's argument would mean that the PRA trumps longstanding statutory and case law allowing prison staff to exercise their authority to keep contraband out of prisons and maintain safe and secure facilities. Under Petitioner's reading of the statutes, the exact same document can be rejected by mailroom staff if it is not received pursuant to an inmate's public disclosure request but must be delivered to him if it is. This would render RCW 72.09.530 superfluous. While it is true the PRA does not allow distinction among requestors, RCW 72.09.530 does allow DOC to scrutinize documents and all mail that is sent to an inmate at a prison and reject those that pose a threat to institutional security.

3. The Court of Appeals' Decision Is Completely Consistent With The Holding Of *Sappenfield v. DOC*.

Petitioner contends that the Court of Appeals' decision below results in a categorical exclusion of a group of persons, inmates, from access to public records. Petition at p. 13. He contends the ruling below is in conflict with the ruling of Division III of the Court of Appeals in *Sappenfield v. Dept. of Corrections*, 127 Wn. App. 83, 110 P.3d 808 (2005). However, the ruling below is entirely consistent with the ruling in *Sappenfield*. In fact, as Petitioner noted, that opinion acknowledges the "unique circumstances of incarceration" and how that affects inmate public disclosure requests. Petition at p. 13.

In *Sappenfield*, the appellant asked to inspect the "Supply Inventory Tracking Request (SITR) forms for Unit C-4," the housing unit he was incarcerated in at Airway Heights Corrections Center (AHCC). *Sappenfield*, 127 Wn. App. at 85, ¶ 2. As here, the public disclosure coordinator at AHCC compiled the documents and, finding no exemptions, informed the appellant that the documents would be mailed to him upon payment of copying and postage costs. This was done pursuant to DOC Policy 280.510 which allows an inmate to inspect his own DOC files but all other documents must be copied and paid for. *Id.* at ¶¶ 3-4. Because the appellant insisted upon inspection of the documents instead,

he considered this a refusal of his request and he administratively appealed this "denial." *Id.* at ¶ 5. So, unlike here, the documents were never mailed by the AHCC coordinator and they never went through the mail screening process at the AHCC mailroom. Thus, there was no decision there as to whether the SITR form constituted contraband.

The only issue before the *Sappenfield* court was whether the DOC policy of requiring inmates to pay for copies of all DOC public records other than an inmate's own files was acceptable given the unique circumstances of incarceration. The court held that it was. Another unique circumstance of incarceration, that the general public is not subjected to in their private homes, is the need to prevent the introduction of contraband into prisons. The *Sappenfield* court did not hold that DOC must abdicate its statutory responsibility to do so when an inmate requests a document via public disclosure.

Here, as in *Sappenfield*, no exemptions from disclosure were claimed and the documents were prepared for disclosure. The documents were even mailed to Petitioner, here, but were rejected as contraband in the mailroom, not because DOC claimed they were exempt from disclosure. Ironically, as Petitioner is no longer incarcerated, he could now request the exact same documents and be free of the mail screening procedures used in DOC's prisons.

B. BECAUSE DOC ACTED CONSISTENT WITH ALL OF ITS STATUTORY OBLIGATIONS, AND PETITIONER HAS A REMEDY TO CHALLENGE DOC'S ACTIONS, REVIEW SHOULD NOT BE GRANTED UNDER RAP 13.4(b)(4).

The holding of the Court of Appeals below is based upon longstanding law that does not require clarification by this Court. An inmate's First Amendment right to send and receive mail is subject to prison regulations reasonably related to penal interests. *Thornburgh v. Abbott*, 490 U.S. 401, 407, 109 S. Ct. 1874, 1878, 104 L. Ed. 2d 459 (1989). Petitioner attempts to create an inconsistency in the law merely because he sought an inappropriate remedy. He has a remedy for challenging the actions of DOC in withholding his mail. That remedy is not dependent upon the source of the incoming mail or purpose for the inmate's receipt of the mail. Petitioner could have challenged the rejection of his mail as a violation of his constitutional rights, but he did not do so.

Before the Court is whether DOC violated the PRA in handling Petitioner's public records request. Yet, even he admits there were no deficiencies in DOC's response other than the ultimate rejection of the letter from the OCC coordinator to him by CCCC mailroom staff.

If Petitioner believes the CCCC Superintendent's actions or DOC Policy 450.100 are unconstitutional, his remedy is to file a lawsuit alleging

a violation of his civil rights. The remedies outlined in the PRA are not the forum for litigating the constitutionality of a prison policy. They are designed to provide an expedited method for judicial review of an agency's decision to deny disclosure of requested documents which did not occur here.

VI. CONCLUSION

Petitioner has not met the criteria for granting review as the Court of Appeals' decision below presents no conflict with existing case law, and no ambiguity exists as to DOC's statutory obligations pursuant to RCW 72.09.530. As such, DOC respectfully requests that this Court deny his Petition for Discretionary Review.

RESPECTFULLY SUBMITTED this 6th day of February, 2007.

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CERTIFICATE OF SERVICE

I certify that I served a copy of **RESPONSE OF THE DEPARTMENT OF CORRECTIONS TO PETITION FOR DISCRETIONARY REVIEW** on all parties or their counsel of record on the date below as follows:

X U.S. Mail, Postage Prepaid
United Parcel Service, Next Day Air
ABC/Legal Messenger
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 6th day of February, 2007, at Olympia, Washington.

Katrina Toal
KATRINA TOAL